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Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1970

No. 1586

STATE OF WISCONSIN, *Petitioner,*

v.

JONAS YODER, *Respondent.*

STATE OF WISCONSIN, *Petitioner,*

v.

ADIN YUTZY, *Respondent.*

STATE OF WISCONSIN, *Petitioner,*

v.

WALLACE MILLER, *Respondent.*

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF WISCONSIN

BRIEF FOR THE PETITIONER

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July 15, 1971

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ON WRIT OF CERTIORARI TO THE SUPREME COURT OF WISCONSIN

BRIEF FOR THE PETITIONER

OPINION BELOW

The opinion of the Supreme Court of the State of Wisconsin (App. 127-153) is reported at 49 Wis. 2d 430, 182 N.W. 2d 539.

JURISDICTION

The Judgment of the Wisconsin Supreme Court was made on January 8, 1971 and a petition for a writ of certiorari was filed April 1, 1971, and was granted May 24, 1971. Jurisdiction of this court rests on 28 USC § 1257 (3).

QUESTIONS PRESENTED

The Supreme Court of Wisconsin has construed the Wisconsin Compulsory Attendance Law, sec. 118.15 Wis. Stats., 1969, to be repugnant to the free exercise of religion as guaranteed by the First Amendment to the United States Constitution. The questions presented are:

(1) Whether Wisconsin's compulsory school attendance law, in particular, secs. 118.15 (1) (a) and 118.15 (5), Wis. Stats., 1969, are constitutional despite respondents' claim that attendance of their children in any school beyond eighth grade would be a violation of respondents' right to worship freely as guaranteed to them by the First Amendment to the United States Constitution.

(2) Whether ruling of the majority opinion of the Wisconsin Supreme Court in *State v. Yoder, et al.*, 49 Wis. 2d 430, 182 N.W. 2d 539 (1970), making an exemption for the respondents and other members of their religious sect from the Wisconsin compulsory attendance law violate the prohibition against the establishment of religion as contained in the First Amendment in the United States Constitution.

(3) Whether the exemption is constitutionally required or whether an exemption granted respondents is properly within the perrogative of the state legislature to grant or withhold as it pleases.

(4) Whether the Wisconsin Supreme Court correctly applied *Sherbert v. Verner* (1963), 374 U.S. 398, 83 S. Ct. 1790, 10 L. Ed. 2d 965, or whether it should have

applied *Prince v. Commonwealth of Massachusetts*, (1943), 321 U.S. 158, 64 S. Ct. 438, 88 L. Ed. 645.

(5) Whether a minor child has a constitutionally protected right to an education superior to the claim of respondent parents that education of their children beyond eighth grade violates respondents' constitutional right to worship freely.

STATUTES INVOLVED

Sec. 103.67

103.67 Minimum ages in various employments. (1) No minor under 16 years of age shall be employed or permitted to work in any gainful occupation during the hours he is required to attend school unless he has completed the most advanced course of study available to him in the public schools as provided in s. 103.71; except that minors under 16 may be employed in agricultural pursuits as provided in s. 103.77 and in public exhibitions as provided in s. 103.78.

(2) No minor under 14 years of age shall be employed, or permitted to work in any gainful occupation at any time; except that minors under 14 may be employed in agricultural pursuits as provided in s. 103.77, minors from 12 to 14 may be employed during school vacations as provided in sub. (3) and in public exhibitions as provided in s. 103.78, boys of 13 may be employed in street trades and boys of 12 may be employed in house-to-house street trades, as provided in ss. 103.21 to 103.31, and boys 12 or over may be employed as caddies on golf courses if they use caddy carts.

(3) Minors from 12 to 14 years of age may be employed during the vacations of the public or equivalent school in the school district or city of their residence in and around a home in work usual to the home of the employer, provided such work is not in connection with or a part of the business, trade or profession of the employer and provided further that such employment shall not be specifically prohibited by any provision of sections 103.64 to 103.82 or by any order of the department.

(4) . Nothing in sections 103.64 to 103.82 shall be construed to apply to the employment of a minor engaged in domestic or farm work performed outside school hours in connection with the minor's own home and directly for his parent or guardian.

Sec. 118.15 (1) (a) Wis. Stats., 1969

118.15 Compulsory school attendance. (1) (a) Unless the child has a legal excuse or has graduated from high school, any person having under his control a child who is between the ages of 7 and 16 years shall cause such child to attend school regularly during the full period and hours, religious holidays excepted, that the public or private school in which such child should be enrolled is in session until the end of the school term, quarter or semester of the school year in which he becomes 16 years of age.

Sec. 118.15 (3)

(3) This section does not apply to any child who is not in proper physical or mental condition to attend school, to any child exempted for good cause by the school board of the district in which the child resides or to any child who has completed the full 4-year high school course. The certificate of a reputable physician in general practice shall be sufficient proof that a child is unable to attend school.

Sec. 118.15 (4)

(4) Instruction during the required period elsewhere than at school may be substituted for school attendance. Such instruction must be approved by the state superintendent as substantially equivalent to instruction given to children of like ages in the public or private schools where such children reside.

Sec. 118.15 (5)

(5) Whoever violates this section or files a false statement under s. 118.16 (1) may be fined not less than $5 nor more than $50 or imprisoned not more than 3 months or both. In a prosecution under this subsection, if the defendant proves that he is unable to comply with the law because of the disobedience of the child in question, the action shall be dismissed and the child shall be proceeded against as delinquent under ch. 48.

Sec. 118.16 (1)

118.16 Truancy. (1) "Truancy" means any absence of one or more days from school during which the principal or teacher has not been notified in writing of the legal cause of such absence by the parent or guardian of the absent pupil, and also means intermittent attendance carried on for the purpose of defeating the intent of s. 118.15. The only legal causes for absence are those specified in s. 118.15 (3) and (4). Upon request of the truant officer, a statement from the local health officer or nurse or attending physician shall be submitted explaining the cause of the pupil's absence.

Sec. 118.16 (4)

(4) A truant officer may visit any place of employment in his locality to ascertain whether any minors are employed therein contrary to law. He shall require that the school certificates and lists of minors who are there employed be produced for inspection, and he shall report all cases of illegal employment to the proper school authorities and to the industrial commission. When a truant officer receives a report or learns by investigation or by personal observation that any child is unlawfully and habitually absent from school, he shall proceed immediately in accordance with sub. (5).

U.S. Const. Amend. I.

ARTICLE I.

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Wis. Const. art X, sec. 3

District schools; tuition; sectarian instruction. SECTION 3. The legislature shall provide by law for the establishment of district schools, which shall be as nearly uniform as practicable; and such schools shall be free and without charge for tuition to all children between the ages of four and twenty years; and no sectarian instruction shall be allowed therein.

SUMMARY OF ARGUMENT

Compulsory education laws have been in existence since colonial times. Massachusetts passed the first state compulsory law in 1852. At the present time all states except Mississippi and South Carolina have compulsory school attendance laws.

The decision of the Wisconsin Supreme Court holding that the Wisconsin compulsory attendance law is unconstitutional as applied to a claim of violation of religious freedom is contrary to all historical and legal precedent. There is not a single case, state or federal, supporting the decision of the Wisconsin Supreme Court. All cases, state and federal, support compulsory school attendance laws and declare them to be constitutional, as against the claim of violation of the constitutional guarantee of religious freedom.

The Wisconsin decision, while acknowledging the right of the state to compel measures to be taken to preserve the health of children as against a claim of religious freedom, ignores the right of the state to insulate a child from the disease of ignorance. It also ignores the concomitant right of the child to know. The Wisconsin court has erroneously created a broad constitutional right to conscientiously object to education. This ignores the fundamental historical and constitutional values that are responsible for the very existence of our country.

The Wisconsin Supreme Court, ignoring controlling legal precedent and historical values, and erroneously relying on *Sherbert v. Verner* (1963), 374 U.S. 398, 83 S. Ct. 1790, 10 L. Ed. 2d 965, has determined that an individual, under a claim of religious belief, may decide to what extent he will comply with a state's compulsory school attendance law, and in balancing the interest of the state as against the religious claim of parents of Amish children, ignored the compelling interest that the state and the individual child have in education.

If a parent does not have the constitutional right to conscientiously object to military conscription of his minor child, he most assuredly does not have the constitutional right to conscientiously object to the education of his child beyond the eighth grade at some school, be it public or private. We must place at least the same constitutional values on our system of education that we place on military conscription of our youth. (See generally *Prince v. Massachusetts* (1943), 321 U.S. 158, 64 S. Ct. 438, 88 L. Ed. 645 and *Gillette v. United States* decided March 8, 1971, — U.S. —, 91 S. Ct. —, 28 L. Ed. 2d 168; 39 Law Week 4305).

ARGUMENT

I. Historical Development And The Common Acceptance Of Our Educational System As A Vital National Institution Demonstrates The Compelling Interest That The Nation Has In Its Creation And Maintenance.

Despite the fact that an educational system is a basic institution in any society and its establishment and maintenance are essential to the survival of that society, a majority of the Wisconsin Supreme Court in a concurring opinion held, simply and without elaboration, that there had been inadequate showing that the state's interest in establishing and maintaining an educational system overrides respondents' right of free exercise of their religion (App. p. 152).

It is a self-evident truth that our nation, indeed, our civilization, including freedom to worship, was not conceived nor has it survived in ignorance. As a matter of fact the idea of popular education as we know it precedes the revolutions of the seventeenth and eighteenth centuries that gave birth to modern western civilization. "Every major philosopher since Plato has written on education. . . . Every major political system from Athens on has had to see to the training of the young for the perpetuation of values it holds most dear."[1/]

On many occasions our national leaders and representatives have expressed the compelling interest that our society has in education. Thomas Jefferson wrote " . . . If a nation expects to be ignorant and free, in a state of civilization, it expects what never was and never will be. The functionaries of every government have propensities to command at will

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[1/] Lawrence Arthur Cremin, Horace Mann Lecture 1965, *The Genius of American Education*, University of Pittsburgh Press p. 1-3.

the liberty and property of their constituents. There is no safe deposit for these but with the people themselves; nor can they be safe with them without information. Where the press is free, and every man able to read, all is safe. . . ."[2/] Again, in commenting on *Bill Seventy-Nine: A Bill For The More General Diffusion Of Knowledge*, Jefferson wrote: ". . . Every government degenerates when trusted to the rulers of the people alone. The people themselves therefore are its only safe depositories. And to render even them safe, their minds must be improved to a certain degree. . . . the influence over government must be shared among all people."[3/]

The provisions of the Northwest Ordinances of 1785 and 1787 are another example of the nation's compelling interest in education. Article III of the Northwest Ordinance of 1787, provided, in part: "Religion and morality and knowledge being necessary to good government and happiness of mankind, schools and the means of education shall be forever encouraged. . . ."[4/]

The fact that government control of education was established early in the history of the colonies is further evidence of this nation's compelling interest in education. This principle of government control of education set a precedent in American life which prevails today. After the separation of the church and state in the late eighteenth and early ninteenth centuries the right of the state to establish and maintain its own schools and grant privileges to private educational

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2/ *The Works of Thomas Jefferson*, Federal Edition, collected and edited by Paul Leicester Ford, 12 volumes, G. P. Putnam's Sons, New York 1905 vol. 11.

3/ *The Writings of Thomas Jefferson*, Saul K. Padover, Duell Sloan and Pierce, Inc. New York 1943 p. 667-670.

4/ W.S.A., Vol. 1, p. 770. See also Encyclopedia Britannica, 1956 edition, p. 681. The Ordinance of 1785 in providing for alienation of land reserved one section of each township for educational purposes.

agencies rested on sound legal precedent. *State of Illinois v. Board of Education*, (1948), 333 U.S. 203, 92 L. Ed. 649.

The pattern of control of education which prevails today had its origin in New England. It consisted, and still consists, of four main principles:

> ". . . the state could require children to be educated; the state could require towns to establish schools; civil government could supervise and control schools by direct management in the hands of public officials and funds could be used for the support of public schools."[5]/

Because of the growth of the democratic ideals, the dangers of ignorance became more apparent and the idea that education of all was clearly in the interest of all became acceptable.

Paralleling the development of the common school at this time were demands for public support of education. The fundamental argument for financial support again was the compelling interest that society has in education.

> "For if an individual fails to receive an education it is not he alone who suffers the consequences. Society too suffers, for in a subsequent limitation in knowledge and skills in getting knowledge, he is not helping the electorate to make the best possible decision."[6]/

Up to the present time Americans have experienced well over three hundred years of state control of education. In 1963-1964 there were approximately 37,405,000 children in

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[5]/ Freeman Butts and Lawrence A. Cremin, *A History of Education in American Culture*, Henry Holt & Co. New York, 1953, p. 103.

[6]/ Ibid. In seeking to gain support for public funding of education Jefferson wrote "the tax which will be paid for this purpose [education] is not more than the thousandth part of what will be paid for kings, priests and nobles who will rise up among us if we leave people in ignorance." Jefferson to George Wythe, August 13, 1786, Paul Leicester Ford Edition (Ed.), *The Writings of Thomas Jefferson*, (New York, Putnam 1894), vol. 4 p. 269. Quoted in *History of Education in American Culture* p. 202.

average daily attendance in secondary and elementary schools in this country. Actual enrollment was close to 42,025,000. Current expenditures and capital outlay amounted in this period to 16.6 billion dollars for about 6.5% of the gross national product.[7]/

The tasks of unifying and raising standards and of equalizing educational opportunity could not have been done without state control. However, considerable autonomy has always rested with local municipalities. This arrangement makes for a closer contact of the system with the people and tends to directly involve them in the important task of educating their children.

While the danger of deadening conformity is ever present, the best method of orderly and meaningful change is through the support of an informed and educated electorate. It is only in such difficult cases as the present one that this court is called upon to state and restate the essential role that education plays in the support and vivification of our civilization.

> "On the basis of prudence alone, no modern industrial nation can fail to afford everyone of its citizens a maximum opportunity for intellectual and moral development. And beyond prudence, there is justice. No society that calls itself democratic can settle for an education that does not encourage universal acquaintance with the best that has been thought and said."[8]/

And, in defining in constitutional terms the importance of education to the individual as well as its importance as a governmental function, this court has stated:

> "Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for

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[7]/ *Standard Education Almanac*, 1969, Alvin Renetzky, et al. Editors (Academic Media, Inc., Los Angeles, California) tables 59, 60, and 34.

[8]/ *Cremins, The Genius of American Education*, p. 47-48.

> education both demonstrate our recognition of importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. . . ." *Brown v. Board of Education of Topeka* (1954), 347 U.S. 483, 494, 74 S. Ct. 686, 98 L. Ed. 873.

Viewing then, popular education in the school as vital to the perpetuation of society, one can accept the extension of the common school idea to the point where it embraces compulsory education for all children in some school whether it would be public or private. Education provides the intelligent electorate with leadership necessary to successfully run our government. Education assuredly helps to prevent crime and provide for the well-being and contentment of members of society.[9/] The state therefore has a right under its police power and the doctrine of *parens patriae* to compel school attendance.

That Wisconsin and the nation have a compelling interest in the establishment and maintenance of a system of education is clear beyond all doubt. It is likewise clear beyond all doubt that this interest overrides the religious interest of the parents of children whose attendance at some school, public or private, is required.

> "True parental freedom can only be based on the parent discharging his full responsibility to his child. Clearly, the child has a right to an education:"[10/]

[9/] History of Education in American Culture p. 357. See also *Prince v. Mass.*, infra.

[10/] Ibid., p. 357

II. Amish Customs And Behavior

The Amish are a pious, industrious and thrifty people, living in small agrarian groups in twenty states and the Canadian Province of Ontario. They are of Anabaptist origin, originally springing from the Mennonite Church under the leadership of Jacob Ammon. They practice adult baptism, nonresistance and refuse to bear arms, to swear on oath, and they refrain from holding public office. *Commonwealth v. Beiler* (1951), 168 Pa. 462, 79 A. 2d 134.[11/]

The goals of Amish life are never stated as matters of doctrine. They abide by acts which make up living in a small society. With them, custom tends to become sacred, behavior is strongly patterned and acts as well as cultural objects are given symbolic meaning. Religion is diffuse and all pervasive.[12/]

Thus, while rules of the Amish Church cover the whole range of human experience, custom is regional. The most universal customs are: "no electricity, telephones, central heating, authomobiles or tractors with neumatic tires; required are beards for all married men, long hair parted, if at all, in the center, hooks and eyes on dress coats and

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11/ John A. Hostetler, Amish Society, Rev. Ed., (John Hopkins Press) p. 6.—"The author himself is not only part of the Amish story but part of the irrevocably changing of the America which comes in some measure even to separatists such as Amish. Born a younger child of an Amish family which was later to be excommunicated largely because of the father's allegedly worldly pride in a fine registered dairy herd, he was socialized to the norm which taboos education beyond the 8th grade. He is now the holder of a Ph. degree in sociology. . . . " ibid., Introduction, p. xvii. See also, Ibid. p. 49.

12/ Ibid. p. 6.

the use of horses for farming and travel. No formal education beyond elementary grades is the rule of life."[13]/ These and other rules or customs are called the *Ordnung*. Those who deviate are subject to excommunication and "shunning." This means that a person who is shunned not only breaks with the belief of the community but also his relatives including his own family. The ban becomes an effective means of dispensing with the offender. By shunning him in all social relations, he is given a status that minimizes the threat to other members of the community. The desire for formal education is one of the factors associated with individual deviation.[14]/

The large number of Amish children are an asset to the Amish farm economy which needs more hand labor than the farm operated by tractor and other machines.[15]/ The child begins to assist his Amish parents at the age of four.

It was only gradually and with reluctance that the Amish complied with attendance requirements through the eighth grade.[16]/ What really brought the conflict into the open has been school consolidation and compulsory education after which period the children have completed the elementary grades. Amish parents have always feared a strong progressive public school for they fear that its aim is to make the child self-sufficient and competent, and perhaps moral without being Christian. They fear what is being taught to their children when they are far away from home by teachers whom they don't know. They resent the schools taking too

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[13]/ Ibid. p. 61
[14]/ Ibid. p. 65
[15]/ Ibid. p. 82, 155
[16]/ Ibid. p. 194

much time away from the family, from the community and from the discipline of farm work. Learning or reading for sheer enjoyment and pleasure is foreign in Amish tradition and not encouraged by most parents.[17]/

However, large numbers of young people voluntarily may leave the Amish community each year and are thereafter forced to make their way in the world (dissenting opinion) (App. 147, 110):

As the dissenting opinion pointed out:

> ". . . By not enforcing the school attendance law, the state of Wisconsin has consigned these young people to a future without any choice or goal except those of the traditional Amish life. They are abandoned without the intellectual tools to survive should they elect to leave the Amish way of life.
>
> "The traditional Amish life has its attractions, but ought this court, by depriving Amish children of all but a bare eighth grade education, block for all time all other avenues for them. This is the effect of this decision. On the basis of the religious beliefs of their parents, the Amish children are without a hearing consigned to a life of ignorance — . . . Unmentioned is the tragic side of Amish life: 'Drinking . . . has become problematic' (Hostetler, *Amish Society,* p. 282); 'Rowdyism and stress' (p. 281); 'Preoccupation with filthy stories' (p. 282); 'Drinking is common in all large Amish settlements' (p. 283); 'It would appear that among the Amish the rate of suicide is just as high, if not higher, than for the nation.' It is highest among young men (p. 300). Amish society is perhaps but another miscrocosm of society — some of it is good and some bad. It is a cross-section of good and evil influences that pervade any society. But the children's denial of education ought not be justified on the mythological basis assumed by the principal opinion." *State v. Yoder* (1971), 49 Wis. 2d 430, 452-453, 182 N.W. 2d 589. (Footnote omitted).

[17]/ Ibid. p. 197

III. The Decision Of The Wisconsin Supreme Court Ignores The Substantive Right Of A Child To An Education.

In failing to recognize substantive right of a child to an elementary and secondary education, the Wisconsin Supreme Court has ignored and misinterpreted well-known cases and familiar principles of law (App. 127). In *Brown v. Board of Education of Topeka* (1954), 347 U.S. 483, 74 S. Ct. 686, 98 L. Ed. 873, the court based its holding on the importance of the right of a child to a basic education and held that the denial by the state of that right constituted denial of equal protection of the laws. Similarly, the Amish child is being denied this right by the theocratic society into which he was born. Any desire for knowledge is stifled and deviation incurs the punishment of "shunning."

Regardless of his ability or desires, the young adult Amish has only two alternatives: To join the Amish church at the age of between sixteen and twenty, or to make his way in the other world with only an eighth grade education.

The court again misconstrues the facts and the law when it states that prior to reaching "the age of judgment, . . . the state in its capacity of *parens patriae* ought not to enforce educational requirements which will directly influence or will destroy his choice of religion." (App. p. 135).

The law is clear that the state does have the right to compel attendance at public or *private* schools. *Pierce v. Society of Sisters of the Holy Names of Jesus and Mary* (1925), 268 U.S. 510, 45 S. Ct. 571, 69 L. Ed. 1070. Therefore, compulsory education need not "destroy" a choice of religion. The Amish may establish their own secondary schools consistent with their religious beliefs.

> ". . . This Court has long recognized that religious schools pursue two goals, religious instruction and secular education. In the leading case of Pierce v. Society of

> Sisters, [citing case], the Court held that although it would not question Oregon's power to compel school attendance or require that the attendance be at an institution meeting State-imposed requirements as to quality in nature of curriculum, Oregon had not shown that its interest in secular education required that all children attend publicly operated schools. A premise of this holding was the view that the State's interest in education would be served sufficiently by reliance on the secular teaching that accompanied religious training in the schools maintained by the Society of Sisters. Since Pierce, a substantial body of case law has confirmed the power of the States to insist that attendance at private schools, if it is to satisfy state compulsory-attendance laws, be at institutions which provide minimum hours of instruction, employ teachers of specified training, and cover prescribed subjects of instruction. *Indeed, the State's interest in assuring that these standards are being met has been considered a sufficient reason for refusing to accept instruction at home as compliance with compulsory education statutes. . . ." Board of Education v. Allen* (1968), 392 U.S. 236, 245, 88 S. Ct. 1923, 20 L. ed. 1060.[18]/ (Emphasis ours).

In *Everson v. Board of Education* (1947), 330 U.S. 1, 18, 67 S. Ct. 504, 91 L. Ed. 711, 168 A.L.R. 1392, this court stated:

> "This Court has said that parents may, in the discharge of their duty under state compulsory education laws, send their children to a religious rather than a public school if the school meets the secular educational requirements which the state has power to impose."

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[18]/ See also *Meyer v. State of Nebraska* (1923), 262 U.S. 390, 43 S. Ct. 625, 67 L. Ed. 1042; cf., *Joseph Burstyn, Inc. v. Wilson* (1952), 343 U.S. 495, 405, 72 S. Ct. 777, 96 L. Ed. 1098, 1108, where the court stated, "the state has no legitimate interest in protecting any or all religions from views distasteful to them."

The right of the state to compel secondary education at some school extends to the child a benefit. This is graphically illustrated by the statistics showing, for example, that people having one to three years of high school education have significantly higher lifetime incomes than those having only an eighth grade education.[19]/ Of course, there are other intangible but nonetheless real benefits to the individual who has an education beyond eighth grade.

It is not, as the Wisconsin Supreme Court has said, "a case of forcing a worldly education on all Amish children, the majority of whom do not want or need it in order to confer a dubious benefit on a few." (App. 135). It is an important benefit and consequently a right which every child has. If the Amish do not want to establish secondary schools for their children, then their children should be required to go to a more "worldly" public secondary school. In failing to provide for secondary education for their children, the Amish are

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Table 23 LIFETIME AND MEAN INCOME OF MALES 25 YEARS OLD AND OVER, BY YEARS OF SCHOOL COMPLETED: SELECTED DATES, 1956-1966

[Prior to 1961, excludes Alaska and Hawaii. Includes members of the Armed Forces living off post or with their families on post, but excludes all other members of the Armed Forces. Figures for lifetime income based on application of appropriate life tables to arithmetic mean income, by age, as obtained for a cross section of population in each year shown. Figures for mean income based on Current Population Survey]

Years of school completed	Lifetime income ($1,000)				Annual mean income			
	1956	1961	1965	1966	1956	1961	1965	1966
ELEMENTARY								
Less than 8 years	122	142	159	174	$2,574	$2,998	$3,283	$3,520
8 years	166	192	216	228	3,631	4,206	4,663	4,867
HIGH SCHOOL								
1 to 3 years	189	223	252	270	4,367	5,161	5,905	6,294
4 years	228	257	297	320	5,183	5,946	6,899	7,494
COLLEGE								
1 to 3 years	268	325	353	381	5,997	7,348	8,133	8,783
4 years or more	359	437	482	520	7,977	9,817	10,823	11,739

Source: U. S., Bureau of the Census, *Statistical Abstract of the United States 1968*.

neglecting a parental duty and obligation to their children and neglecting their duty as citizens of a democracy from which they have reaped ample benefit.[20]/

To dispose of the right of a child to a secondary education as "a dubious benefit" is a strange disregard of historical fact and legal precedent.

> "The American people have always regarded education and acquisition of knowledge as matters of supreme importance, which should be diligently promoted. . . . Corresponding to the right of control, it is the natural duty of the parent to give his children education suitable to their station in life; and nearly all the states . . . enforce this obligation by compulsory [attendance] laws." *Meyer v. Nebraska* (1923), 262 U.S. 390, 400, 43 S. Ct. 625, 67 L. Ed. 1042.

In determining constitutionally valid legislation permitting children to be transported to private schools at taxpayers expense, and legislation furnishing textbooks at taxpayers expense to children attending private as well as public schools, and the right of children to attend desegregated schools, this court has never left in doubt the fundamental importance with which it regards education and the individual's right thereto. *Everson v. Board of Education* (1947), 330 U.S. 1, 67 S. Ct. 504, 91 L. Ed. 711, *Board of Education v. Allen,* supra, *Brown v. Board of Education,* supra, *Cooper v. Aaron* (1958), 358 U.S. 1, 78 S. Ct. 1401, 3 L. Ed. 2d 5, and *Griffin v. County School Board of Prince Edward County* (1964), 377 U.S. 218, 84 S. Ct. 1226, 12 L. Ed. 2d 256:

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[20]/ See generally, *History of Education in American Culture.* cf, *Amish Society.* See also, *Reynolds v. United States* (1878), 98 U.S. 145, 166, quoting Thomas Jefferson's address to the Danbury Baptists to the effect that "man has no natural right in opposition to his social duty."

> "History and custom have now established the assumption that everyone will receive some education to be provided by the state if no one else. . . . Education has come to be recognized as a critical interest similar to those involved in voting and criminal process, necessary to a meaningful participation in human society and in the benefits which it offers.[21]/

The Amish children are being deprived of that right just as surely and effectively as were the Black children prior to the implementation of *Brown I.* The Amish must take cognizance of this right and concomitant duty to provide a secondary education for their children in schools which are satisfactory to their religion or else send them to the public schools.

IV. The Wisconsin Compulsory School Attendance Law Is Constitutional As Against The Claim Of Respondents That The Right To Worship Freely Would Be Constitutionally Violated If They Are Compelled To Send Their Children To A Secondary School.

A. The decision of the Wisconsin Supreme Court is contrary to all authority on the subject.

The decision of the majority of the Wisconsin Supreme Court is in direct conflict with the decisions of the United States Supreme Court and numerous state jurisdictions dealing with the subject (App. pp. 120, 127). In *Prince v. Commonwealth of Massachusetts* (1943), 321 U.S. 158, 64 S. Ct. 438, 88 L. Ed. 645, this court, in ruling that an individual's religious belief could not constitutionally obviate the state child labor law, stated at p. 165-166:

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[21]/ See: Developments in the Law—Equal Protection, 82 Harv. L. Rev. 1065, 1183.

"But the family itself is not beyond regulation in the public interest, as against a claim of religious liberty. *Reynolds v. United States,* 98 U.S. 145, 25 L. ed. 244; *Davis v. Beason* (1889), 133 U.S. 333, 33 L. ed. 637, 10 S. Ct. 299. And neither rights of religion nor rights of parenthood are beyond limitation. Acting to guard the general interest in youth's well being, the state as *parens patriae* may restrict the parent's control by *requiring school attendance,* regulating or prohibiting the child's labor, and in many other ways. . . . (Emphasis added.)

"* * *

"The state's authority over children's activities is broader than over like actions of adults. This is peculiarly true of public activities and in matters of employment. A democratic society rests, for its continuance, upon the healthy, well-rounded growth of young people into full maturity as citizens, with all that implies. . . ."

The Wisconsin Supreme Court erroneously interprets *Prince* as being more concerned with public safety (App. 135). It is not public safety as such, but the welfare of the child about which *Prince* is concerned.

The child labor laws referred to in *Prince* and the compulsory attendance laws are correlative and spring from the same concern for the welfare of the child. This common relationship is well documented historically.[22/]

[22/] Lawrence A. Cremin, The Transformation of the School, Alfred A. Knopf, New York (1961) p. 127. "Massachusetts passed the first statewide compulsory-attendance law in 1852; Mississippi was the last of the states to pass one, in 1918. During the interim educational reformers learned some painful facts of political life. They discovered, among other things, that passing a law does not necessarily get children to school; that in the absence of proper statistical records there is no way of knowing in the first place whether or not children are attending; that without effective enforcement procedures the very children the law is designed to coerce escape its beneficent influence; and that without correlative measures regulating child labor and employment a compulsory attendance law is a sham, unenforceable and ultimately meaningless." See also Steinhilber & Sokolowski, *State Law on Compulsory Attendance,* H.E.W., Office of Education, page 3,4: "Child labor and school census laws are closely allied to compulsory school attendance laws. . . . Enforcement of the compulsory school attendance laws with stricter youth employment statutes, more effective accounting procedures, and school census laws have led to dramatic growths in school enrollment. . . ."

Modern state statutes reflect this correlation. The Wisconsin child labor law prohibits the employment of a minor under age of 16 during hours he is required to attend school.[23]/

History, custom and logic make it clear that it is not possible to have one regulatory statute dealing with compulsory education and not have a regulation dealing with child labor. The point then is clear that *Prince v. Massachusetts* applies not only to child labor, but also to compulsory school attendance laws.

This principal of *parens patriae,* as applied to minors in *Prince,* was reaffirmed in *Ginsberg v. State of New York* (1968), 390 U.S. 629, 88A S. Ct. 1274 (reh. den.), 20 L. Ed. 2d 195, 391 U.S. 971, 88 S. Ct. 2029, where this court, after citing *Prince* with approval, stated that "the well being of its children is, of course, a subject within the state's constitutional power to regulate. . . ."

Nonetheless, the Wisconsin Supreme Court erroneously views this case "as involving solely a parent's right of religious freedom to bring up his children as he believes God dictates." (App. 133).

The Wisconsin court further misconstrues *Re Gault* (1967), 387 U.S. 1, 87 S. Ct. 1428, 18 L. Ed. 2d 527, as diminishing the doctrine of *parens patriae.* This case actually expanded the right of the minor to *procedural* due process. It did not weaken, but, if anything, strengthened the role of *parens patriae* in protecting minor's substantive rights and well being.

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[23]/ See sec. 103.67, Wis. Stats., and sec. 118.15, Wis. Stats. See also *Commonwealth v. Smoker* (1955), 177 Pa. Super 435, 110 A.2d 740.

In addition, the several states that have ruled on compulsory education have unanimously held them to be constitutional as constituting a valid exercise of the police power of the state and the doctrine of *parens patriae* to protect the best interests of society by securing to its children the opportunity to acquire an education. Cases involving the Amish are: *State v. Garber* (1966), 157 Kan. 567, 419 P. 2d 896, *cert. den.* 389 U.S. 51, 88 S. Ct. 236, 19 L. Ed. 50; *State v. Hershberger* (1955), 103 Ohio App. 188, 144 N.E. 2d 693; *Commonwealth v. Smoker* (1955), 177 Pa. Super 43, 110 A.2d 740; *Commonwealth v. Beiler* (1951), 168 Pa. Super 462, 79 A.2d 693.[24]/

There is no case or precedent to support the holding of the Wisconsin Supreme Court that the Wisconsin compulsory attendance law is unconstitutional as applied to the respondents.

> "A parent does not have a right to withhold his child from all secular schooling or from secular schooling that he thinks is religiously detrimental. But he does have a right to send him to a religious school which meets the requirements of the state's education laws. Religious societies have a right to operate such schools. Parents may not inculcate religion by practices which violate school attendance laws — even to observe their Sabbath or religious holidays — or child labor laws."[25]/

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[24]/ Other cases upholding the compulsory school attendance laws are: *Commonwealth v. Bey* (1950), 166 Pa. Super 136, 70 A.2d 693; *Rice v. Commonwealth* (1948), 188 Va. 224, 49 S.E. 2d 342; *Marsh v. Earle* (1938), 24 F. Supp. 385, 14 A.2d 368; *Stephans v. Bongart* (1937), 15 M.J.M. 80, 189 A. 131; *State v. Williams* (1929), 370, 228 N.W. 470; *Parr v. State* (1927), 177 Ohio 23, 157 N.E. 555; *DeLease v. Noland* (1918), 185 App. Div. 82, 172 N.Y.S. 552; *State ex rel. O'Bannon v. Cole* (1909), 220 Mo. 697, 119 S.W. 424; *State v. Jackson* (1902), 71 N.H. 552, 53 A. 1021; *State v. Bailey* (1901), 157 Ind. 324, 61 N.E. 730.

[25]/ Galanter Religious Freedoms, 1966 Wisconsin Law Review, 217, 299.

B. The Wisconsin Supreme Court erred in applying *Sherbert v. Verner* in granting a non-statutory exemption to the respondents.

Having erroneously concluded that it may ignore the fundamental right of a child to know, the Wisconsin court proceeded to carve out an exemption to the Wisconsin compulsory education law without any consideration being given to the manifest compelling interest of the state in education.

In the recent case of *Gillette v. United States*, U.S. , 91 S. Ct. , 28 L. Ed. 2d 168 (March 8, 1971), this court interpreted a statute creating a conscientious objector status in the military conscription laws. The court held that to achieve such a status one must object to all wars and not merely a particular war. There is more than a superficial resemblance of this case to the present case.[26]/ The court has apparently accepted the language of *United States v. McIntosh* (1931), 283 U.S. 605, 51 S. Ct. 570, 75 L. Ed. 1302, and other cases to the effect that there is no non-statutory exemption from military conscription.[27]/

The Wisconsin court was then in error when it imposed on education a constitutional value of far lesser importance by holding that the United States constitution does provide for an exemption from compulsory education. It is submitted that such a constitutional exemption does not exist.

In the *Gillette* case, the exemption was created by statute. In Wisconsin, the exemption was created by the court. The exemption granted by the Wisconsin court is as follows:

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[26]/ i.e., the Amish do not object to all education, only education beyond the 8th grade.

[27]/ *Gillette v. United States*; see cases cited in footnote 23.

> ". . . [C]hildren of members of the Old Order Amish religion, . . . living as members of the Amish community, should not be required to attend school which meets the requirements of state law beyond the eighth grade." (App. 152).

Assuming for sake of argument that the latter course of action may be validly accomplished, the exemption, as granted, is subject to the objection voiced in *United States v. Seeger* (1965), 380 U.S. 163, 188, 85 S. Ct. 860, 13 L. Ed. 2d 733.[28]/

To be constitutionally valid, the exemption must extend to all individuals the right to assert, under a claim of religious belief, what degree of compliance there must be with compulsory school attendance laws.

The necessary effect of the Wisconsin decision, therefore, is to create a broad constitutional right to conscientiously object to education rather than a narrow exemption for a particular religion. This broad scope of selective exemptions necessitated by the decision, however, was precisely what petitioners in *Gillette* argued for. This court rejected the concept. In doing so, it held that "Its analysis . . . has revealed governmental interest of a kind and weight sufficient to justify under the free exercise clause the impact of the conscription laws on those who object to particular wars." *Gillette v. United States* (1971), U.S. , 28 L. Ed. 2d 168, at p. 187. It is precisely this analysis concerning the kind and weight of governmental interest, as well as the

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[28]/ See concurring opinion of Justice Douglas in *United States v. Seeger*, at p. 188, to the effect that a statute in exempting conscientious objectors from military service which would embrace one religious faith rather than another violates the free exercise clause of the First Amendment and results in the denial and equal protection by preferring some religions over others and further, that it is an invidious discrimination violating due process clause of the Fourteenth Amendment. See also *Dalli v. Board of Education* (1971), — Mass. App. Div. —, 267 N.E. 2d 219.

weighing of the interest of the child that is lacking in the Wisconsin decision. The interests of the state in education are at least as important as the Federal government's interest in conscription laws.

Furthermore, in *Sherbert,* there were only 2 of 150 Seventh Day Adventists, that were unable to find suitable employment. In the present case, at the very least, the children of 50,000 Amish parents are involved plus an undetermined number of non-Amish throughout the nation who could argue that because of their similar conscientious beliefs, they are entitled to equal protection of the laws and that their children are therefore entitled to an exemption from compulsory school attendance.

The Wisconsin Supreme Court has overextended the doctrine of the *Sherbert* case.

> ". . . The Sherbert case at most would relate to a shared time arrangement, that is, a plan making the public education program available to those whose religious convictions inhibit them from full time attendance at a public school. . . ."[29]/

C. The exemption granted by the Wisconsin Court violates the establishment clause.

While the compulsory attendance law fulfills the requirement of the establishment clause that the constitutional value of neutrality be observed, this is not true of the exemption which the court has granted to the Amish. This exemption is not "secular in purpose, even handed in operation and neutral

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[29]/ Paul A. Freund, *Public Aid To Parochial Schools,* 82 Harv. L. Rev. 1680, 1688.

in primary impact." *Gillette v. United States* (1971), U.S. , 28 L. Ed. 168, 181. In addition, the effect is "an excessive degree of governmental entanglement." *Walz v. Tax Commission of New York City* (1970), 379 U.S. 664, 90 S. Ct. 1409, 25 L. Ed. 2d 697. This is because of the wide variety of the beliefs, conditions of membership and the theological concepts of community as opposed to natural geographic limitations of the community, which membership in the Amish community involves. The administrative authorities in the State of Wisconsin, for example, would have a great deal of difficulty in determining the status of Amish in their community as well as their particular beliefs. Their attempt to comply with the mandate of the Wisconsin Supreme Court would constitute "excessive entanglement." This is particularly true because "there is lack of unanimity among the members of the Amish communities in Wisconsin as to their attitudes toward public education which may make it . . . certainly difficult to devise specific proposals exempting them from school policies and requirements."[30]/ . . . .

D. Administration of benevolent neutrality should be the exclusive right of the legislative branch.

It seems clear that if the exemption granted the Amish is not a constitutional right then it is an exemption which must, of course, have the approval of the legislature. To arrive at a constitutionally valid application of the principle of benevolent neutrality is primarily a function of the legislature. Such matters as exemption of religious bodies from taxes or laws concerning education are within the exclusive power of the

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[30]/ Wisconsin Legislative Counsel Staff Report to the Education Committee on the Amish Community in Wisconsin and Selected Other States. Legislative Reference Library, State Capitol, Madison, Wis., p. 29.

legislature to grant or withhold as it desires. Religious bodies, for example, have not a constitutional right to a tax exemption but one may be granted without violating the establishment clause. By the same token, children are not constitutionally entitled to free textbooks when they attend private schools even though the same may be furnished to public school children free. However, the legislature may again grant or withhold this right without violating the First Amendment. So, in the present case, it may either exempt the Amish or withhold such an exemption as it choses. As a matter of fact, the Wisconsin legislature recently considered and rejected an attempt to accomodate the Amish through modification of the compulsory attendance law.[31]/ However, this does not mean that the legislature may not at some future time review this matter and, in the light of changing values in education, respond to an informed electorate by enacting the legislation which will satisfy both the compelling interest of the state, the interest of the child and the Amish.

The Wisconsin decision does none of these. It neither satisfies the compelling interest of the state or the interest of the child, and as far as the Amish are concerned, it applies on its face only to members of the Old Order Amish.

Clearly, the right to deal with the matter should be left in the hands of the legislature as has been the case in Pennsylvania, Ohio and other states where Amish reside.

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[31]/ See Wisconsin Legislative Counsel Staff Report, p. 3.

CONCLUSION

Surely, the State has as great, if not greater, an interest in the education of its children as it does in preventing polygamous marriages as against the assertion that such State interest must yield to the right of an individual to elect what law he will obey under a claim of freedom of religion. See *Church of Jesus Christ of Latter Day Saints v. United States* (1889), 136 U.S. 1, 10 S. Ct. 792, 34 L. Ed. 478; *Davis v. Beason,* supra, and *Reynolds v. United States,* supra.

The judgment of the Wisconsin Supreme Court sets dangerous and erroneous precedent and for that reason, should be reversed.

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